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No. 72-19

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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

PETER WEISS, GEORGIANNA CESTERO, RICHARD NEUHAUS, ROSE BROOKS, DAVID BORDEN, ELLEN MILLER, SEMA LEDERMAN (MOSS), ANDREW ROBINSON, PATRICIA SALTONSTALL (ROSEMOND), JAMES M. KEMPTON, JANE BUCHENHOLZ, FRANKLIN MILLER and ELLIS BOAL,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

REPLY OF PETITIONERS TO BRIEF OF CITY OF CHICAGO IN OPPOSITION

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I.

THE CITY OFFERS NO LEGAL JUSTIFICATION FOR HALTING THE MARCH.

The City of Chicago Brief in Opposition states that there were two separate orders given. First, not to proceed south and second, to disperse. Neither the record nor the Opinion of the Illinois Supreme Court supports the City's

assertion that any order to disperse was given. The Supreme Court Opinion went to great lengths to convert the order not to proceed south into an order to disperse. It is precisely this construction that the Petitioners are attacking. The Illinois Supreme Court Opinion states:

> "The first question to be determined is whether the order not to proceed south of the 18th Street was an order of dispersal under Section 193-1(d). . . . The clear intent of this order was that the march would be dispersed if and as it attempted to move south and it was an order of dispersal within the meaning of section 193-1(d)." (Pet. Cert. 7a)

Apparently the City recognizes that this construction by the Illinois Supreme Court is not satisfactory, as even the City must concede that an order not to proceed south cannot be construed as an order to disperse. Therefore, the City asserts erroneously that an order to disperse was given.

A.

In This Case It Is Academic To Consider Whether An Order to Disperse Might Have Been Appropriate When No Such Order Was Given.

By predicating their argument on the false premises that an order to disperse was given, the City proceeds to reason that, therefore, the Petitioners were not convicted of disobeying the order stopping the march at 18th Street. Nevertheless the City feels it necessary to justify the closing of the street and the stopping of the march. This is done by relying on cases which state that in certain circumstances, free speech activities can be terminated or prohibited. This general proposition is not an issue in this case. What the City does not assert is

any legal basis under Illinois law for the action of the City Police and National Guard in stopping the march. The cases cited either state the proposition that as a matter of principle where there is lawful authority for the same First Amendment activities may be regulated; *Cox* v. *Louisiana,* 379 U.S. 559 (1965); or concern the construction of an unlawful assembly statute as in *People* v. *Uptgraft,* 8 Cal. App. 3rd Supp. 1, 87 Cal. Rptr. 459 (1970) and *People* v. *Hairston,* 8 Cal. App. 3rd Supp. 19, 87 Cal. Rptr. 470 (1971).

The case of *Milk Wagon Drivers* v. *Meadowmoor Dairies,* 312 U.S. 287 (1941), is hardly in point, since that case involved the right of a Court after judicial determination to restrict picketing under circumstances where violence had, or might occur. This judicial authority can hardly be asserted by peace officers acting without any statutory authority and without any opportunity for hearing by the parties affected. No person can reasonably be expected to understand Section 193-1(d) as giving peace officers such authority, particularly when as here it is conceded that " — as of the time when it [the order not to proceed south] was given, when admittedly the march continued to be peaceful and orderly. . ." (Pet. Cert. 7a). Yet the Illinois Supreme Court goes on to hold that the authority for the termination of the march is precisely Section 193-1(d) which requires as an element of the offense that there be acts of disorderly conduct in the vicinity authorizing a dispersal order. Such construction can hardly comport with the holdings of this Court in *Gregory* v. *Chicago,* 394 U.S. 111 (1969), *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960) and *Bachellar* v. *Maryland,* 397 U.S. 564 (1970).

B.

Construing Section 193-1(d) As An Ordinance Permitting Peace Officers to Terminate Peaceful Assemblies Renders the Ordinance Overbroad.

Part I.B. of the City's argument attempts to justify the result in this case by stating that a failure to disperse where violence is being committed is punishable and that, in fact, this is why the Defendants were punished. However, the Opinion of the Illinois Supreme Court and the record in this case, demonstrates conclusively that the Petitioners were punished not because they failed to disperse under circumstances where three or more persons were creating acts of disorderly conduct, but that they were arrested for marching south. This is the whole point of the National Guard line opening to allow persons to march through a corridor to be arrested. Obviously under the dynamics of the situation, the police, Guardsmen and demonstrators all recognized that Petitioners were arrested for the act of marching south. This is what was announced to the demonstrators; namely, anyone marching south would be arrested. Perhaps such conduct by Petitioners violated some Illinois statute or City of Chicago ordinance. Perhaps the action of the Petitioners in marching south could have been a violation of Section 11-33(a) of the Chicago Municipal Code[1] relating to resisting or obstructing the performance of a peace officer of an authorized act within his official capacity. See, for example, the construction of the Illinois Supreme Court with respect to the predecessor of Section 11-33(a) in *Chicago* v. *Meyer*,

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[1] The text of this ordinance is set forth in the Petition for Writ of Certiorari, footnote 2, page 7. Some of the Petitioners were initially charged with a violation of this ordinance, but these charges were dropped prior to trial.

44 Ill. 2d 1, 253 N.E. 2d 400 (1969), cert. den. 397 U.S. 1024, reh. den. 398 U.S. 915. Perhaps the conduct of marching south might have violated 193-1(c) of the Chicago Municipal Code (Pet. Cert. 13a). However, the City deliberately elected not to prosecute under these Chicago Ordinances, but specifically elected to prosecute under Section 193-1 (d), which has no application to the facts or circumstances for which the Petitioners were arrested. Therefore, *Gregory* v. *Chicago,* 394 U.S. 111 (1969), requires reversal here. The case of *Bachellar* v. *Maryland,* 397 U.S. 564 (1970) cited by the City (Rsp. Br. 10) certainly supports the Petitioners' position and not the City's. There the record did not clearly show that the Defendants' conviction was not based solely on their expression of unpopular views. Here the record shows the Petitioners were convicted solely because they persisted in walking to the International Amphitheatre.

The City's citation of the Model Penal Code and ordinances and statutes of other jurisdictions which have been held facially valid, is hardly in point as it is clear from the facts in this case that the Defendants were arrested and convicted for something which has no relation whatsoever to the ordinance under which they were tried and convicted. However, it is worth noting that most of the cases cited by the City are cases involving unlawful assembly, an element which is not found in the Ordinance in question.

II.

AS CONSTRUED BY THE ILLINOIS SUPREME COURT IN THIS CASE SECTION 193-1(d) IS VAGUE AND OVERBROAD ON ITS FACE.

Petitioners agree with the City that the construction of the Illinois Supreme Court of its ordinances is im-

portant to determining whether the ordinance is facially invalid for vagueness or overbreadth. In addition to the previous cases in which the ordinance was construed by the Illinois Supreme Court, this Court must also consider the instant case as being part of the construction. In the instant case it is clear that the Illinois Supreme Court construes this ordinance to apply to violations of police lines. Nowhere in the ordinance is there anything which remotely would put a person of reasonable intelligence on notice that he can be guilty of an offense under 193-1 (d) for violating a police line. While *Chicago* v. *Jacobs*, 46 Ill. 2d 214, 263 N.E. 2d 41 (1970), did peripherally involve a peace demonstration, the specific circumstance of the arrest and conviction differ markedly from that in the instant case. In any event, the validity of the ordinance was not an issue in the *Jacobs* case. The other two cases in which the validity of the ordinance was challenged, *Chicago* v. *Fort*, 46 Ill. 2d 12, 262 N.E. 2d 473 (1970) and *Chicago* v. *Greene*, 47 Ill. 2d 30, 264 N.E. 2d 163 (1970), cert. den. 402 U.S. 996, did not involve any First Amendment activity.

In any case, regardless of the construction in the other cases, the Illinois Supreme Court has amply illustrated in this case, it is prepared to construe Section 193-1(d) in a way which makes it possible to punish peaceful conduct wholly unrelated to any violence or threat of violence. Thus, in the context of this case, whatever violence may have been committed in the vicinity, had nothing to do with the police order to move the march west or back north. Not only is this not an order of dispersal, it is an order which could not be intended to have an effect on terminating whatever violence might have been existing or might be threatened in the vicinity.

If the ordinance is to be given a reasonable and narrow construction, the order of dispersal must be reasonably related to terminating the "disorderly conduct", *i.e.*, violence mentioned in the ordinance. The Illinois Supreme Court Opinion in this case indicates that it is prepared to punish innocent, peaceful persons merely because there is a happenstance that nearby some violent activity is occurring. Certainly, such a construction renders the ordinance overbroad. It is preposterous to state that the statute as construed by the Illinois Supreme Court does not permit an order of dispersal absent in imminent threat of violence as, in fact, the record in this case demonstrates that that is precisely the way the Illinois Supreme Court construed the ordinance; namely, to punish innocent conduct without an imminent threat of violence or with respect to any violence related to the activities of the parties involved. See particularly the Illinois Supreme Court's discussion of the arrest and conviction of Petitioner Weiss (Pet. Cert. 10a-11a). It is clear from the facts that the Petitioners were separating themselves from the group by marching south and being arrested. Ironically they have been convicted for failing to disperse when, in fact, they were the only people in the group that were dispersing. We have already noted above that the Illinois Supreme Court interpretation of this ordinance permits an order of dispersal to be given when the conduct of the assembled group is peaceful and orderly. This construction of the Illinois Supreme Court of its ordinance renders it both overbroad and void for vagueness.

For the above reasons and the reasons stated in the Petition for Writ of Certiorari, this Court should grant Certiorari.

Respectfully submitted,

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